LIABILITY OF LANDOWNERS TO CHILDREN ENTERING WITHOUT PERMISSION.[1]

II.

UPON weighing all the considerations which have been urged up to this point in the discussion, it will probably be admitted by many lawyers that the landowner ought not to be made an insurer of the lives and limbs of childish intruders. But it may be said that such a stringent responsibility is not claimed, and that the better authorities in favor of the child would subject the landowner only to a limited liability, in substance as follows: He is under a duty to take care, not whenever he makes any change whatever in the natural condition of the land, but only when he makes changes which offer special attractions to children and are likely seriously to endanger children yielding to the attractions; and his duty even then is, not an absolute obligation to prevent the possibility of harm to children, but only a duty to take reasonable care under the circumstances to prevent harm.[2]

To this claim of a modified or limited liability there are two answers.

First: The weight of reason inclines to the conclusion that a landowner is under no greater liability (so far as concerns the condition of his premises) to childish intruders "attracted" by his methods of beneficial use, than to adult intruders; *i. e.*, he is under no liability to either class. Upon this view, he is under no duty to have his premises in safe condition for the unpermitted entry of children, nor to take any affirmative measures to keep children out or to protect them after entry. If he is under no

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[1] Continued from page 373.

[2] For a carefully guarded statement of the liability, see the opinion in Keffe *v.* Milwaukee & St. P. R. Co, 1875, 21 Minn. 207, which the present writer regards as the ablest opinion on the side of the child. The Minnesota court has done its best in subsequent cases to apply and enforce the limitations laid down in the above initial decision. See Kolsti *v.* R. R., 1884, 32 Minn. 133; Haesley *v.* R. R., 1891, 46 Minn. 233; Twist *v.* Winona, etc. R. Co., 1888, 39 Minn. 164; also Emerson *v.* Peteler, 1886, 35 Minn. 481.

Some of the judicial utterances in other jurisdictions have not been so cautiously guarded.

obligation to do any of these things, he is, of course, under no obligation to use any care to do them. It would be a solecism to speak of obligation to use care in the performance of a non-existent duty.

Second: These plausible attempts at limitation, if adopted, would be practically ineffective. Obviously, they would not prevent the landowner from being subjected to the expense and worry of litigation. And, what is still more important, they would not, in the great majority of cases, prevent the landowner from being practically subjected to an absolute liability, substantially equivalent to that of an insurer. The questions of attractiveness and care would generally have to be determined by a jury, and the verdict of that tribunal would seldom be against the child.

The reply of Lord Penzance to an attempt to impose a qualified liability in another branch of the law deserves attention here. An action was brought against a witness who had testified before a military court of inquiry. The plaintiff alleged that the witness knew his testimony to be false and gave it from a malicious motive. The House of Lords held that no action would lie, the statement of the witness being absolutely privileged.[1] Lord Penzance said:[2] "It is said that a statement of fact of a libellous nature which is palpably untrue — known to be untrue by him who made it, and dictated by malice — ought to be the subject of a civil remedy, though made in the course of a purely military inquiry. This mode of stating the question assumes the untruth and assumes the malice. If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law of the land should give damages to the injured man. But this is not the state of things under which the question of law has to be determined. Whether the statements were, in fact, untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is, whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and may yet in the eyes of a jury be open to that

[1] Dawkins *v.* Lord Rokeby, 1875, L. R. 7 H. L. 744.
[2] L. R. 7 H. L. pp. 755, 756.

imputation; or, again, the witness may be cleared by the jury of that imputation, and may yet have to encounter the expenses and distress of a harrowing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands."

It is the policy of the law not to expose certain classes of persons, or their acts and conduct in certain situations, to the harrowing uncertainty and vexation of litigation. In a certain sense it is true, as was said by Mr. Justice Holmes,[1] that the use of one's own land is conduct "of the most highly privileged kind." We have seen[2] that there are various cases of user causing damage beyond the borders of the land where the majority of courts refuse the sufferer permission to litigate even the question of the owner's motives. Are there not at least equal reasons for refusing permission to litigate the questions of attractiveness and prevention in the class of cases now under consideration?

It is true that a judge may sometimes rule that there is no evidence upon which the case can go to a jury. But if the qualified liability contended for is once admitted and is consistently applied, a judge can seldom withhold the plaintiff's case from the consideration of the jury. A question of fact, not of law, would generally be involved, and there would be a remarkable absence of definite tests.

What object is not attractive to children?[3] And how seldom can it be said that the attraction is not fraught with danger? "The average boy," said Mr. Justice Mitchell, "can make a plaything out of almost anything, and then so use it as to expose himself to danger."[4] Under this test, almost anything is attractive and dangerous which a jury may think fit to call so.[5]

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[1] 8 HARVARD LAW REVIEW, 13.

[2] *Ante*. pp. 362, 363.

[3] ". . . the question suggests itself, what object or place is not attractive to very young persons who are left free to pursue their innate propensity to wander in quest of amusement? What object at all unusual is exempt from infantile curiosity? What place, conveniently accessible for their congregation, is free from the restless feet of adventurous truants?" Gaines, C. J., in Missouri, etc. R. Co. *v.* Edwards, 1896, Texas, 36 Southwestern Rep. 430, p. 432. See also Hunter, J., in Dublin, etc. Co. *v.* Jarrard, 1897, Texas, 40 Southwestern Rep. 531, pp. 534, 535; Paxson, J., in Gillespie *v.* McGowan, 1882, 100 Pa. State, 144, p. 151; Valentine, J., in Kansas C. R. Co. *v.* Fitzsimmons, 1879, 22 Kansas, 686, pp. 690, 691.

[4] Twist *v.* Winona, etc. R. R., 1888, 39 Minn. 164, p. 167.

[5] See Denman, J., in Dobbins *v.* Missouri, etc. R. Co., 1897, Texas, 41 Southwestern Rep. 62, p. 63.

What definite age can be named as the time when young children cease to be guided by instinct and become capable of self-protection?[1] How is the court to effectually restrain the tendency of the jury to attribute the conduct of *all* children to their childish instincts? No doubt a nonsuit can occasionally be ordered, or a verdict set aside as against evidence. But in the greater number of cases it will be found impossible to prevent these questions of childish instinct or capacity from going to the jury, and almost equally impossible to disregard their verdict.

What standard of care can be adopted that will not practically result in juries holding landowners to the responsibility of insurers? If the court simply instruct that the requirement is "reasonable care," then it is likely that "reasonable," in the opinion of the jury, will connote a superhuman amount of energy and foresight. And the effect will not be substantially different if the court give a fuller explanation of the term. If it be once conceded that a duty rests on the landowner to use care to keep children off his property, or to protect them while there from dangers arising from the usual condition of the premises, then it would be absurd to require of him so small an amount of care as would be unlikely to serve the end aimed at. If he is held to be under any duty in this regard, it is not likely to be set lower than this; viz., a duty to use such an amount of care, to use such precautions, as will render it improbable that harm will result to children attempting to enter upon his premises.[2]

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[1] It has been intimated that a child who knows that it is wrong for him to go upon railway premises and there play upon a turn-table, may yet recover for damage sustained in such play, unless he also knows that such use of the turn-table is dangerous. See Horton, C. J., in U. P. R. Co. *v.* Dunden, 1887, 37 Kansas 1, pp. 7, 8. But if the child is a conscious trespasser, though he may not be barred on the specific ground that he has been "negligent" (see Simpson, C. J., in Bridger *v.* A. & S. R. Co., 1885, 25 So. Car. 24, pp. 32, 33), yet he cannot avail himself of the claim of "innocence" usually set up in his behalf. See Mitchell, J., in Twist *v.* Winona, etc. R. Co., 1888, 39 Minn. 164. So if the child has been warned of danger, or forbidden (by parent or landowner) to enter, and is old enough to understand and remember the warning or prohibition, it would seem that his failure to appreciate the danger ought not to make the landowner liable. See Newdoll *v.* Young, 1894, 80 Hun, 364. But in Price *v.* Atchison Water Co., 1897, Kansas, 50 Pacific Rep. 450, the fact that "a bright intelligent boy of about eleven" had been "frequently warned" by his parents of the danger of going to the reservoir, does not seem to have been considered sufficient to exonerate the landowner from liability for his drowning in the reservoir. See also Dublin Cotton Oil Co. *v.* Jarrard, Texas, 1897, 42 Southwestern Rep. 959.

[2] "If a child go uninvited upon a neighbor's property, and be drowned in his tank . . . or is injured while playing with his cane mill or corn sheller, and the court assume the affirmative of the first question above stated," *i. e.*, assume that the law

But this would, in truth, require in many cases precautionary measures which could not be carried out save at an expense, or in a manner, practically prohibitive of all beneficial user. "To hold that every piece of ground which contains some place or some thing that might be dangerous to children must be so fenced that children can enter only by what is practically a mode of siege, would be to lay an intolerable burden on proprietors."[1] Yet will any less efficacious method be regarded as affording reasonable probability that no child catastrophe will occur? It must be remembered that a jury will not reach this question unless they have already found that the premises were attractive and dangerous to children. Assuming the attractiveness and the danger, and assuming that the proprietor is under a duty to use care to guard children against this danger, can that duty be performed to the satisfaction of a jury, save by making his ground "practically impregnable" to children; in other words, "child-proof"?[2] But would not this, in many instances, compel the total cessation of profitable user? Take the case of an artificial pond, the creation of which was a practical necessity for manufacturing purposes, or to store water for stock or irrigation. "A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence[3] around the lot upon which a pond is situated would answer the purpose; and, therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed."[4] Furthermore, the counsel for the plaintiff will urge that the very occurrence of the accident is in itself decisive evidence that reasonable care was not used to prevent it; and this application of the *res ipsa loquitur* doctrine, though an over-statement and discountenanced by the judge, is likely to carry controlling weight in the deliberations of the jury-room.

Suppose even that the judge goes still further (much further,

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imposes upon the owner a duty to use care to keep his property in such condition that persons going thereon without his invitation would not be injured, "the jury would in most cases be warranted in finding that the neighbor had not used reasonable care to so guard his tank, etc., or lock his cane mill or corn sheller, as to avoid such injury." Denman, J., in Dobbins *v.* Missouri, etc. R. Co., 1897, Texas, 41 Southwestern Rep. 62, p. 63.

[1] See Lord Justice Clerk Macdonald in Ross *v.* Keith, 1888, 16 Scotch Session Cases, 4th Series, 86, pp. 89, 90.

[2] See 16 Scotch Session Cases, 4th Series, 86, pp. 89, 90.

[3] "No ordinary fence is much of an obstruction to an active boy." Carpenter, J., in Nolan *v.* N. Y., etc. R. Co., 1885, 53 Conn. 461, p. 473. Compare Doster, C. J., in Price *v.* Atchison Water Co., 1897, Kansas, 50 Pacific Rep. 450, p. 452.

[4] Beatty, C. J., in Peters *v.* Bowman, 1896–1897, 115 California, 345, p. 355.

indeed, it is believed, than judges have generally gone), and tells the jury that, in determining what is reasonable care, they should take into account, not only the desirability of preserving innocent children from harm, but also the desirability of making beneficial use of land. How much weight will the jury allow to the latter consideration when put in competition with the former in a concrete case appealing to their sympathies? How much consideration will they give to the general impolicy of hampering the use of land with troublesome and expensive restrictions when they have before them a maimed child, or the mourning relatives of a deceased infant?

Where the existence of a legal duty is once admitted, the danger that a jury will be too swift to find a breach of it, does not afford a sufficient reason for abrogating the duty. But when the question under discussion is, whether a duty should be held to exist, whether in a particular class of cases the law ought to impose a duty; and when the case is confessedly on the border line, and other strong reasons can be given against establishing the duty, then the probability that the rule contended for would often be misapplied by juries, may well be given great, and even decisive, weight in influencing courts against the establishment of the alleged duty. Notable instances, where the court frankly admitted itself to be influenced by the consideration that practical injustice would frequently result from the recognition of an alleged doctrine, are to be found in the late decision of the New York Court of Appeals in Mitchell *v.* Rochester R. Co.,[1] and in the still more recent decision of the Massachusetts Supreme Court in Spade *v.* Lynn & B. R. Co.,[2] where Mr. Justice Allen said: "It would seem, therefore, that the real reason for refusing damages sustained from mere fright . . . probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. . . . But as the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice."[3]

All the really important arguments in favor of the child have now been considered. But, to make the discussion complete,

[1] 1896, 151 N. Y. 107; Martin, J., p. 110. Compare Sir Richard Couch in Victorian R'y Com'rs *v.* Coultas, 1888, L. R. 13 App. Cases, 222, p. 226.

[2] 1897, 168 Mass. 285, p. 288.

[3] See also Black, J., in Kalen *v.* Terre Haute & I. R. Co., 1897, Indiana, 47 Northeastern Rep. 694, p. 698.

brief notice should, perhaps, be taken of certain other positions, although they do not seem to us entitled to any weight.

The maxim *sic utere tuo ut alienum non lædas* has been quoted as affording a decisive reason in favor of the child plaintiff; as establishing a duty on the landowner and *per se* justifying a recovery against him. To the argument founded on this maxim there is more than one answer. First: the maxim is of no value whatever as affording either a rule or a reason for the decision of cases. The criticisms upon it by such jurists as Austin, Erle, and Selden (quoted at length in 9 HARVARD LAW REVIEW, pp. 14, 15), demonstrate its utter worthlessness in these respects. Those criticisms, in brief, are: The maxim cannot be applied until after the case is decided, when it is no longer needed; it is not "workable" until after we have got a definition of "*tuo*" and "*alienum*," which are generally the very matters in dispute; if "*lædas*" means "injury," it is a merely identical proposition; and if "*lædas*" means "damage," it does not represent the real state of the law, being entirely inconsistent with any such conception as *damnum absque injuria*.[1] Second: Even if the maxim had any real worth, yet such an application would extend it to an entirely different class of cases from that to which it has usually been supposed applicable. "The maxim that a man must use his property so as not to incommode his neighbor, only applies to neighbors who do not interfere with or enter upon it."[2] It refers only to "acts the effect of which extends beyond the limits of the property."[3]

Sometimes it is said that the landowner is liable, because his use of his own land in a manner dangerous to intruding children constitutes a "nuisance." The introduction of this term solves no difficulty, but instead prolongs the controversy. The question, whether a nuisance or not, must be open for discussion; and it simply presents, in other phraseology, the original inquiry, viz., where the law ought to impose a duty or confer a remedy in such cases. "An actionable nuisance" is defined by Judge Cooley[4] as

[1] See also Mr. Justice Holmes, 8 HARVARD LAW REVIEW, 3.

[2] Clark, J., in Frost *v.* Eastern R. R., 1886, 64 N. H. 220, p. 222.

[3] Vanderburgh, J., in Ratte *v.* Dawson, 1892, 50 Minn. 450, p. 453. See also Gibson, C. J., in Knight *v.* Abert, 1847, 6 Pa. State, p. 472. See also the *dictum* of Brett, L. J.: "The cases have decided that where that maxim is applied to landed property, it is subject to a certain modification; it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land." West Cumberland Iron, etc. Co. *v.* Kenyon, 1879, L. R. 11 Chan. Div. 782, p. 787.

[4] Torts, 2d ed. 670.

"anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights." To determine, then, whether there is a nuisance, it is necessary to consider whether the acts of the landowner are wrongful, and whether any legal rights of the child have been infringed, — the very points already under discussion.

It may be suggested that a class of cases of which Lynch *v.* Nurdin [1] is a type, should be considered as authorities against the landowner. In Lynch *v.* Nurdin, a man left his horse and cart unattended in the street. A child got upon the cart in play and was hurt. The owner was held liable. There the alleged "attractive" chattels were left in a public place, where the plaintiff and the defendant "had an equal right to be." But this is very different from the case where the owner leaves the chattel on his own land, where the child has no right to come. The distinction is clearly pointed out by Mr. Justice Peckham in Walsh *v.* Fitchburg R. R.[2]

Two attempts have been made to establish general propositions, which, if correct, would apply to adults as well as children, and would be broad enough to justify a recovery in the class of cases now under consideration. One is the much-discussed formula suggested by Lord Esher (then Brett, M. R.), in Heaven *v.* Pender.[3] The other is to be found in Ray on "Negligence of Imposed Duties — Personal," pp. 32 and 33. The objections to Lord Esher's proposed formula have been sufficiently stated by Mr. Beven in a note to the first edition of his work on Negligence; [4] and the proposition seems irreconcilable with a line of hitherto unquestioned authorities.[5] Furthermore, it may be remarked that the learned

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[1] 1841, 1 Q. B. 29.

[2] 1895, 145 New York, 301, pp. 311, 312. See also Mr. Justice Collins, in Ponting *v.* Noakes, L. R. (1894), 2 Q. B. 281, pp. 290, 291.

Reference may be made here to some cases where the owner of property has been held not liable to children harmed by coming in contact with it, even though the contract occurred in a public place and not upon the owner's land. See Hughes *v.* Macfie, 1863, 2 Hurl. & Colt. 744; and the much-criticised decision in Mangan *v.* Atterton, 1866, L. R. 1 Exch. 239. See also Gay *v.* Essex Electric Street R. Co. (1893), 159 Mass. 238; Bishop *v.* Union R. Co. (1884), 14 R I. 314; Emerson *v.* Peteler (1886), 35 Minn. 481; Jefferson *v.* Birmingham, etc. Co. (1897), Alabama, 22 Southern Rep. 546; Rushenberg *v.* St. Louis, etc. R. Co., 1892, 109 Missouri, 112.

[3] 1883, L. R. 11 Q. B. Div. 503, p. 509.

[4] Beven on Negligence, 1st ed. 63, note 1. See especially the latter part of the note.

[5] See Clerk & Lindsell on Torts, 2d ed. 399, note (*e*).

judge himself has since materially limited the scope of his original formula by declining to apply it to such cases as Le Lievre *v.* Gould.[1] Mr. Ray's broad statement would not, we think, be correct, even if confined to cases where both parties are in a place where they have an equal right to be, *e. g.*, a public highway or park. Taken in its literal terms, the proposed rule would seem to include inducement by the mere force of personal example. And when we pass from events transpiring on the public highway to acts done by a man upon his own land in making a use of that land which is otherwise reasonable and lawful, there is still less support for the general proposition.

Lastly, we ought to notice the unquestionable fact that some judges appear to have been largely influenced by the now exploded theories advanced in the report of the old case of Lambert *v.* Bessey,[2] whereby the law was supposed to regard the damage suffered by the plaintiff rather than the question whether the defendant was in fault. ". . . he that is damaged ought to be recompensed." Few modern judges have had the frankness of Lord Cranworth,[3] and hence these views have seldom been openly stated as the basis of decision; but they have, nevertheless, furnished the internal *ratio dedicendi* in more than one modern case. It can scarcely be necessary, at the present day, to point out the objections to this mode of reasoning.[4]

Upon full consideration of all the grounds heretofore urged in favor of either view, it seems to us that the arguments in favor of the child are not equal in weight to the arguments in favor of the landowner. Our conclusion, therefore, is that the law ought not to impose upon the landowner even a qualified liability, so far as the condition of his premises is concerned, to children entering without permission, although "attracted" by his method of making beneficial use of his premises.

But though it be conceded that a rule imposing even a qualified liability would not work well if applied to all cases, still the ques-

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[1] L. R. (1893) 1 Q. B. 491, p. 497. Compare Clerk & Lindsell on Torts, 2d ed. 412. See also Brett, L. J., in West Cumberland Iron, etc. Co. *v.* Kenyon, 1879, L. R. 11 Chan. Div. 782, p. 787.

[2] 31 Car. II., T. Raymond, 421, pp. 422, 423.

[3] See Rylands *v.* Fletcher, 1868, L. R. 3 H. L. 330, p. 341.

[4] See Doe, J., in Brown *v.* Collins, 1873, 53 N. H. 442, pp. 445, 446.

tion may be raised whether such a rule cannot fairly be applied to special classes of cases, carefully limited and distinguished from the great mass. Various attempts will undoubtedly be made to map out such special classes; but it is believed that none of the attempted distinctions will be found tenable.

It may, for instance, be suggested that the landowner should be liable if his user were "non-natural;" and the well-known opinion of Lord Cairns, in Rylands *v.* Fletcher,[1] may be cited as an authority for this view. But to this suggestion there are two answers. First: Lord Cairns applied the test in reference to an entirely different subject; viz., the liability of a landowner where the effect of an act done by him on his own land has extended beyond his own boundary, and has caused damage to his neighbors who have not interfered with, or entered upon, his land. But in the case now under discussion the user is confessedly harmless to those who keep off the defendant's land, and the plaintiffs are persons who entered upon defendant's land without his permission. Second: The test itself is either hopelessly vague, or totally irreconcilable with the progress of civilization, or with anything save a return to savage life and primitive conditions. The criticisms of Mr. Justice Doe on this test have never been effectually answered.[2] To apply this test to determine a man's liability to intruders upon his soil would impose a heavy burden upon agricultural and mechanical industry, and would be "putting enterprise at the mercy of juries."

A distinction somewhat like that just commented upon was attempted by Chief Justice Beatty, in the recent case of Peters *v.* Bowman.[3] But his distinction, so far as it is not founded in the novelty of the use, would seem to rest largely on degrees of danger; and must finally be applied by the jury rather than the judge. An attempt to apply it would, it is believed, be open to most of the objections we have heretofore urged.

Possibly efforts will be made to have the courts rule that certain common modes of user shall be deemed extra-hazardous, and that in cases falling within this class of extra-hazardous uses the landowner shall be liable even to intruders. This doctrine would apply to adult intruders as well as to children; and hence the propriety of its adoption is hardly a subject for extended discussion in this

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[1] 1868, L. R. 3 H. L. 330, p. 339.

[2] Doe, J., in Brown *v.* Collins, 1873, 53 N. H. 442, p. 448. See also Mr. J. M. Gets, in 33 Am. Law Reg. & Rev. N. S. p. 103.

[3] 1896–1897, 115 Calif. 345, pp. 356, 357.

article, where we are considering whether the landowner should be held responsible to children in cases where he would not be liable to an adult under similar circumstances.[1] But it may be suggested that the attempt made in Rylands *v.* Fletcher[2] to establish a broad class of extra-hazardous uses in cases where the user operated to cause damage outside the borders of the land, has not been such a complete success as to encourage its extension to a different kind of damages, viz., the damages done to intruders upon the land where the user takes place. The scope of the "wide and stringent rule" in Rylands *v.* Fletcher has been limited by subsequent English decisions. "In every case of the kind which has been reported since Rylands *v.* Fletcher, that is, during the last twenty-five years, there has been a manifest inclination to discover something in the facts which took the case out of the rule. There are some authorities which are followed and developed in the spirit, which become the starting-point of new chapters in the law; there are others that are followed only in the letter, and become slowly but surely choked and crippled by exceptions."[3] And in this country the rule has been decisively rejected in several States.[4]

If a landowner whose premises are adjacent to a public highway makes changes on his land endangering the safety of travellers who accidentally deviate from the public way, he may be held liable for damage sustained in case of such accidental deviation.[5] But he is not liable to an adult traveller who is "attracted" to the land by the owner's mode of using his premises. It is sought, in the case of children, to extend the responsibility of the owner of land adjacent to a highway by making him liable, not merely to those who accidentally deviate from the highway, but also to those who intentionally enter upon his land, if they are drawn thither by so-called "attractions." It is suggested that "the child obeying its instinct" may be regarded "as in the same position as a person who, without negligence, falls off the highway" into an adjoining pit. This claim, it seems to us, is merely a repetition of the contention already urged in behalf of children who pass from private premises to the defendant's land. Unless the child can, in that case, successfully

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[1] *Ante*, p. 349.

[2] 1868, L. R. 3 H. L. 330.

[3] Pollock's Law of Fraud in British India, 53, 54.

[4] See the acute conjecture of Mr. E. R. Thayer, in 5 HARVARD LAW REVIEW, 186, note 1, as to the probable future of the rule laid down in Rylands *v.* Fletcher.

[5] Some cases apply the doctrine only under very narrow limitations, as to the proximity of the danger to the highway and the extent of the deviation.

distinguish his position from that of the adult, he cannot do so here.[1] In both cases the question is, whether a duty is due from the landowner to a child where no duty is due to an adult. The establishment of such a duty seems open to most of the objections urged in the former case. The rule as to liability to travellers accidentally deviating from the highway is itself in the nature of an exception to the general immunity of landowners, and is of very limited application, entailing only a comparatively trifling burden. The proposed extension would be much more onerous to the landowner, and it is believed that the existence of such a liability has never been taken into account in assessing damages for the laying out of highways.

(Whether a municipality, resting under a statutory obligation to keep a highway in safe condition for travel, is liable for not erecting barriers adequate to prevent "discretionless, unattended children" from straying off the highway upon adjacent premises, is a different question from the one just discussed as to the duty of the adjacent owner. The difference is illustrated by Clark *v.* Manchester.[2] In that case the city itself happened to be the owner of the alleged dangerous premises adjacent to the highway. The court held that the city *quâ* owner was not liable. The plaintiff amended his declaration by adding a count[3] which stated a case for an injury from an insufficiently guarded highway, the count being based on the statutory obligation of the municipality to keep the highway in safe condition for travel. Upon this count the plaintiff was allowed to go to the jury,[4] and finally recovered judgment.[5] Upon the question, whether a public body, under a statutory duty to keep highways in suitable repair, is bound to make special provision for the safety of children too young to take care of themselves, there is a seeming conflict of authority.)[6]

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[1] "The same principle applies whether the unauthorized entry be made on private grounds, with private grounds as a medium of reaching the locality where the injury occurs, as applies where a public street is used for a like purpose." Sherwood, J., in Moran *v.* Pullman, etc. Co., 1896, 134 Missouri, 641, p. 651.

[2] 1882–1883, 62 N. H. 577; 1887, 64 N. H. 471.

[3] 62 N. H., p. 581.

[4] 62 N. H., pp. 581–584.

[5] 64 N. H. 471.

[6] The tendency of the following cases is against the existence of such an obligation: Maginnis *v.* City of Brooklyn, 1889, 7 N. Y. Supplement, 194; affirmed without opinion, 1891, 126 N. Y. 644; Gavin *v.* Chicago, 1880, 97 Ill. 66; Oil City, etc. Bridge Co. *v.* Jackson, 1886, 114 Pa. State, 321; Clark *v.* City of Richmond, 1887, 83 Virginia, 355. See also Gaughan *v.* Philadelphia, 1888, 119 Pa. State, 503.

The following cases tend, either by their reasoning or their result, to support a con-

Which way the weight of American authority inclines upon the main question considered in this article, is an inquiry not easily answered. When the subject first began to be discussed, the tendency was in favor of holding the landowner liable. The opinion of the Supreme Court of the United States in the Stout case, in 1873,[1] was reinforced in 1875 by the far abler opinion of the Supreme Court of Minnesota, in the Keffe case.[2] These two comparatively early decisions exerted much influence on other courts. Subsequently some courts which originally adopted this view began to call a halt. And in very recent years the tendency of the decisions seems in the opposite direction. But there has never been unanimity among the different States, and in some States the court can hardly claim the merit of consistency. Tribunals, which have held the owner liable to children hurt while playing on turn-tables, have held him free from liability in cases not easily distinguishable in principle. It is difficult to tell on which side of the line to place certain decisions. The fact that the final result of a particular case was in favor of the landowner does not always furnish conclusive evidence of the position of the court upon the main question. The court may have held that, even if the alleged rule exists, the plaintiff has not made out a case falling within it. Hence it was unnecessary to pass directly upon the question of the existence of such a rule. The decision may have been put upon the ground that there was not sufficient evidence of attractiveness, or not requisite proof that plaintiff was actuated solely by childish instincts, or not satisfactory evidence that defendant failed to take reasonable precautions. Decisions based upon such grounds can hardly be regarded as direct judicial affirmations that the rule exists, and that it would be applied to a case falling completely within its terms. Nor, on the other hand, can one feel sure that the court which thus disposes of the particular case would not fully endorse the rule if there were no escape from squarely meeting that issue.

Many of the American authorities are collected in the note

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trary view: Clark *v.* Manchester, *ubi sup.*; Greer *v.* Stirlingshire Road Trustees, 1882, 9 Scotch Session Cases, 4th Series, 1069. See, however, comments in Glegg's Law of Reparation, pp. 247, 248, where the author says: "Probably the correct view of the law is to be found in Lord Young's dissent in Greer's case."

See also City of Omaha *v.* Richards, 1896, 49 Nebraska, 244; affirmed, 1897, 50 Nebraska, 804.

[1] 17 Wallace, 657.

[2] 21 Minn. 207.

below, which does not purport to include cases where the decision was based on the existence (whether rightly or wrongly found) of either an actual invitation or an actual license.

NOTE. — We give first the "turn-table cases" grouped by themselves.

Where railroad turn-tables have been left insecurely fastened, and children have been hurt while playing on them, the railroad company has been held liable in the following jurisdictions: —

U. S. Supreme Court: Sioux City, etc. R. Co. *v.* Stout, 1873, 17 Wallace, 657, affirming 2 Dillon, 294.

Minnesota: Keffe *v.* Milwaukee & St. P. R. Co., 1875, 21 Minn. 207; O'Malley *v.* St. P., etc. R. Co., 1890, 43 Minn. 289.

Missouri: Koons *v.* St. L., etc. R. Co., 1877, 65 Missouri, 592; Nagel *v.* M. P. R. Co., 1882, 75 Missouri, 653.

Kansas: Kansas, etc. R. Co. *v.* Fitzsimmons, 1879, 22 Kansas, 686; U. P. R. Co. *v.* Dunden, 1887, 37 Kansas, 1.

Texas: Evansich *v.* G. R. R., 1882, 57 Texas, 126; Gulf, etc. R. Co. *v.* McWhirter, 1890, 77 Tex. 356; Fort Worth, etc. R. Co. *v.* Measles, 1891, 81 Tex. 474.

Georgia: Ferguson *v.* Columbus & Rome R'y, 1885–1886, 75 Ga. 637; s. c. 77 Ga. 102.

Washington: Ilwaco R. & W. Co. *v.* Hedrick, 1890, 1 Washington, 446.

California: Barrett *v.* Southern Pacific R. Co., 1891, 91 Calif. 296.

South Carolina: Bridger *v.* A. & S. R. Co., 1885, 25 South Carolina, 24.

Nebraska: 1881, A. & N. R. Co. *v.* Bailey, 11 Nebraska, 332 (judgment for original plaintiff was reversed, and case remanded for new trial; but court adopt doctrine of R. R. *v.* Stout, *ubi supra*).

In the following jurisdictions liability in turn-table cases has been denied: —

New Hampshire: Frost *v.* Eastern R. Co., 1886, 64 N. H. 220.

Tennessee: Bates *v.* Nashville, etc. R. Co., 1891, 90 Tenn. 36.

Massachusetts: Daniels *v.* N. Y. & N. E. R. Co., 1891, 154 Mass. 349.

New York: Walsh *v.* Fitchburg R. Co., 1895, 145 N. Y. 301.

Liability was also denied in R. R. *v.* Bell, 1876, 81 Illinois, 76, in view of "the isolated position" of the turn-table in question.

In cases of alleged "dangerous attractions," other than turn-tables, decisions adverse to the landowner have been given in the following instances: —

Birge *v.* Gardiner, 1849, 19 Conn. 507; Whirley *v.* Whiteman, 1858, 1 Head, Tenn. 610; Mullaney *v.* Spence, 1874, 15 Abbott's Practice Rep. N. S. 319; Hydraulic Works Co. *v.* Orr, 1877, 83 Pa. State, 332; Powers *v.* Harlow, 1884, 53 Mich. 507; Bransoms' Adm'r *v.* Labrot, 1884, 81 Ky. 638; Schmidt *v.* Kansas City Distillery Co., 1886, 90 Missouri, 284; Mackey *v.* City of Vicksburg, 1887, 64 Miss. 777; Harriman *v.* Pittsburgh, etc. R. Co., 1887, 45 Ohio State, 11; Brinkley Car Co. *v.* Cooper, 1895, 60 Arkansas, 545; Price *v.* Atchison Water

Co., 1897, Kansas, 50 Pacific Reporter, 450 (possibly to be regarded as decided partly on the ground of tacit license); City of Pekin *v.* McMahon, 1895, 154 Ill. 141. (And see Phillips, C. J., in Siddall *v.* Jansen, 1897, Illinois, 48 Northeastern Rep. 191, p. 192.) Dublin, etc. Co. *v.* Jarrard, 1897, Texas, Court of Civil Appeals, 40 Southwestern Rep. 531.

In the following cases of alleged dangerous situations, other than turn tables, the decisions have been favorable to the landowner: —

Hargreaves *v.* Deacon, 1872, 25 Mich. 1; Central, etc. R. Co. *v.* Henigh, 1880, 23 Kansas, 347; Haesley *v.* R. R., 1891, 46 Minn. 233; McEachern *v.* R. R., 1890, 150 Mass. 515; Catlett *v.* St. Louis, etc. R. Co., 1893, 57 Arkansas, 461; Barney *v.* H. & St. J. R. R., 1894, 126 Missouri, 372; McAlpin *v.* Powell, 1877, 70 N. Y. 126; Gillespie *v.* McGowan, 1882, 100 Pa. State, 144; Clark *v.* Manchester, 1882–1883, 62 N. H. 577; Charlebois *v.* Gogebic, etc. R. Co., 1892, 91 Mich. 59; Overholt *v.* Vieths, 1887, 93 Missouri, 422; Greene *v.* Linton, 1894, 27 N. Y. Supp. 891; Grindley *v.* McKechnie, 1895, 163 Mass. 494; Richards *v.* Connell, 1895, 45 Nebraska, 467; City of Omaha *v.* Bowman, 1897, Nebraska, 72 Northwestern Rep. 316; Moran *v.* Pullman, etc. Co., 1896, 134 Missouri, 641; Klix *v.* Nieman, 1887, 68 Wis. 271; Missouri, etc. R. Co. *v.* Dobbins, 1896, Texas Court of Civil Appeals, 40 Southwestern Rep. 861; affirmed in Supreme Court of Texas, 1897, 41 Southwestern Rep. 62; Peters *v.* Bowman, 1896–1897, 115 Calif. 345; Newdoll *v.* Young, 1894, 80 Hun, 364; Ratte *v.* Dawson, 1892, 50 Minn. 450. (Compare Talty *v.* City of Atlantic, 1894, 92 Iowa, 135, and Hawley *v.* Same, 1894, 92 Iowa, 174.) Robinson *v.* Oregon, etc. R. Co., 1891, 7 Utah, 493; Rodgers *v.* Lees, 1891, 140 Pa. State, 475; Springer *v.* Byram, 1893, 137 Ind. 15; Chicago, etc. R. Co. *v.* Bockham, 1894, 53 Kansas, 279; Fredericks *v.* Illinois, etc. Co., 1894, 46 La. Ann. 1180; Gulf, etc. R. Co. *v.* Cunningham, 1894, 7 Texas Civil Appeals Rep. 65; Slayton *v.* Fremont, etc. R. Co., 1894, 40 Nebraska, 840; O'Connor *v.* Illinois Central R. Co., 1892, 44 La. Ann. 239; Witte *v.* Stifel, 1894, 126 Missouri, 295; McGuinness *v.* Butler, 1893, 159 Mass. 233; McCaull *v.* Bruner, 1894, 91 Iowa, 214; Missouri, etc. R. Co. *v.* Edwards, 1896, Supreme Court of Texas, 36 Southwestern Rep. 430; Holbrook *v.* Aldrich, 1897, 168 Mass. 15.

See also Bedle, J., in Vanderbeck *v.* Hendry, 1871, 34 New Jersey Law, 467, p. 473. Adams, J., in Wood *v.* Ind. School District, 1876, 44 Iowa, 27, pp. 31, 32; Mergenthaler *v.* Kirby, 1894, 79 Maryland, 182.

Jeremiah Smith.